Muraliraj a/l Balasepramaniam v Timbalan Menteri Dalam Negeri Malaysia & Ors

HIGH COURT (IPOH) — CRIMINAL APPLICATION NO AA-44–40–11 OF 2017
ANSELM CHARLES JC
14 JULY 2018

Criminal Procedure — Habeas corpus — Application for — Writ of habeas corpus against legality of detention order — Whether Tamil interpreter provided when statement being recorded — Whether detenu entitled to be represented by counsel before he made representation to Advisory Board — Whether detenu prejudiced when Form II not translated to Tamil — Dangerous Drugs (Special Preventive Measures) Act 1985

This was an application by the detenu for a writ of habeas corpus against the legality of a detention order made by the Deputy Home Minister ('the Deputy Minister') under s 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') ordering Muraliraj a/l Balasepramaniam ('the detenu') to be detained for a period of two years at Pusat Pemulihan Akhlak Machang, Kelantan ('the centre') commencing from 5 June 2017. The detenu was arrested under s 3(1) of the Act on 13 April 2017. Investigations commenced soon thereafter when Superintendent of Police Shafee bin Abd Samad reported to Dato' Pahlawan Mohd Dzuraidi bin Ibrahim that the investigation against the detenu could not be completed within a period of 14 days. On 24 April 2017, Dato' Pahlawan Mohd Dzuraidi bin Ibrahim submitted a report on the circumstances surrounding the arrest of the detenu to the Deputy Minister in order to comply with the condition requiring the police to conduct investigations beyond 14 days. On 17 April 2017, police investigation officer ('the IO') Insp Police Mohd Fadly bin Shamsudin recorded a statement from the detenu. He was assisted by D/Cpl Muhammad Ajwab bin Anuar. The statement was interpreted to the Tamil language by D/Cpl Sathiaseelan a/l Velandi. The Deputy Minister issued the detention order ('the DO') dated 5 June 2017 pursuant to s 6(1) of the Act for a period of two years with immediate effect. The DO, grounds for the DO, statement of facts and three copies of the form for making representations ('Form I') were served and explained by D/Cpl Sathiaseelan a/l Velandi on 5 June 2017. On 6 June 2017, the detenu was brought to the centre. The detenu was informed and explained about the DO, grounds for the DO, statement of facts and his right to make representations. On 7 June 2017, the detenu submitted Form I to the centre which was then served on the Advisory Board ('the board') on the same date. The Board sent a notice of hearing of representation ('Form II') which was fixed on 23 August 2017 at the centre on the detenu. On 28 August 2017, the

board presented a recommendation to the Yang di-Pertuan Agong ('the YDPA') concerning the representations made by the detenu pursuant to s 10(1) of the Act and the YDPA consented to the DO made by the Deputy Minister on 13 September 2017. It was alleged that no Tamil interpreter was provided when the detenu's statement was recorded; the detenu was not given an opportunity to engage counsel with regard to his arrest and detention before the DO was issued by the Deputy Minister; and there was no Tamil interpreter provided when Form II was served on the detenu.

Held, dismissing the application for habeas corpus:

(1) There was sufficient evidence that the statement had been recorded and interpreted to the detenu. The recording officer, the person who had assisted the recording office and the interpreter all deposed to this fact (see paras 27 & 31).

(2) The effect of art 149 of the Federal Constitution ('the FC') pursuant to which the Act was created would deny the detenu the right to legal representation as enshrined in art 5(3) of the FC unless stated otherwise under the Act itself or the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules') made under it. Rules 4(3) and 5(2) of the Rules provided the only circumstances could the detenu be entitled to legal representation in which he did have (see paras 38 & 40).

(3) Although Form II was not interpreted to the detenu in Tamil it did not in any way had any 'direct relevance to the making of the detention order' as the detenu was present throughout the proceedings before the Board and that he was legally represented there. The fact that Form II was not translated to the Tamil language did not in any way prejudice the detenu. It was also hard to accept where the detenu himself stated that he understood Bahasa Malaysia, the fact that he did not understand Form II (see paras 41 & 43).

[Bahasa Malaysia summary

Ini adalah permohonan oleh *detenu* untuk writ habeas corpus terhadap kesahihan perintah penahanan yang dibuat oleh Timbalan Menteri Dalam Negeri ('Timbalan Menteri') di bawah s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta') yang memerintahkan Muraliraj a/l Balasepramaniam ('detenu') ditahan selama dua tahun di Pusat Pemulihan Akhlak Machang, Kelantan ('pusat') bermula dari 5 Jun 2017. *Detenu* telah ditangkap di bawah s 3(1) Akta pada 13 April 2017. Siasatan bermula tidak lama kemudian apabila Penguasa Polis Shafee bin Abd Samad melaporkan kepada Dato' Pahlawan Mohd Dzuraidi bin Ibrahim bahawa siasatan terhadap *detenu* tidak dapat diselesaikan dalam tempoh 14 hari. Pada 24 April 2017, Dato' Pahlawan Mohd Dzuraidi bin Ibrahim telah

mengemukakan laporan tentang keadaan sekeliling penangkapan *detenu* kepada Timbalan Menteri untuk mematuhi syarat yang memerlukan polis menjalankan siasatan melebihi 14 hari. Pada 17 April 2017, pegawai penyiasat polis ('IO') Polis Inspektor Mohd Fadly bin Shamsudin mencatatkan kenyataan daripada *detenu*. Dia dibantu oleh Koperal Detektif Muhammad Ajwab bin Anuar. Kenyataan itu ditafsirkan kepada bahasa Tamil oleh Koperal Detektif Sathiaseelan a/l Velandi. Timbalan Menteri mengeluarkan perintah tahanan ('PT') bertarikh 5 Jun 2017 menurut s 6(1) Akta untuk tempoh dua tahun dengan serta merta. PT, alasan untuk PT, kenyataan fakta dan tiga salinan borang untuk membuat representasi ('Borang I') disampaikan dan dijelaskan oleh Koperal Detektif Sathiaseelan a/l Velandi pada 5 Jun 2017. Pada 6 Jun 2017, *detenu* dibawa ke pusat. *Detenu* telah dimaklumkan dan dijelaskan tentang PT, alasan untuk PT, kenyataan fakta dan haknya untuk membuat representasi. Pada 7 Jun 2017, *detenu* menghantar Borang I ke pusat yang kemudiannya disampaikan kepada Lembaga Penasihat ('Lembaga') pada tarikh yang sama. Lembaga menghantar notis pendengaran representasi ('Borang II') yang telah ditetapkan pada 23 Ogos 2017 di pusat kepada *detenu*. Pada 28 Ogos 2017, Lembaga telah mengemukakan perakuan kepada Yang di-Pertuan Agong ('YDPA') berkenaan dengan representasi yang dibuat oleh *detenu* selaras dengan s 10(1) Akta dan YDPA bersetuju dengan PT yang dibuat oleh Timbalan Menteri pada 13 September 2017. Adalah didakwa bahawa tiada juru bahasa Tamil disediakan apabila kenyataan *detenu* direkodkan; *detenu* tidak diberikan peluang untuk mendapatkan peguam berkenaan dengan penangkapan dan penahanannya sebelum PT dikeluarkan oleh Timbalan Menteri; dan tiada juru bahasa Tamil yang disediakan apabila Borang II disampaikan kepada *detenu*.

Diputuskan, menolak permohonan habeas corpus:

(1) Terdapat keterangan yang mencukupi bahawa kenyataan itu telah direkodkan dan ditafsirkan kepada *detenu*. Pegawai rakaman, orang yang telah membantu pegawai rakaman dan jurubahasa semuanya bersumpah atas fakta ini (lihat perenggan 27 & 31).

(2) Kesan perkara 149 Perlembagaan Persekutuan ('PP') menurut yang mana Akta dibuat akan menafikan hak *detenu* untuk representasi undang-undang sebagaimana yang termaktub dalam perkara 5(3) PP kecuali dinyatakan sebaliknya di bawah bertindak sendiri atau Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) 1987 ('Kaedah-Kaedah') yang dibuat di bawahnya. Kaedah 4(3) dan 5(2) Kaedah-Kaedah memberikan satu-satunya keadaan yang boleh menghalang representasi undang-undang yang mana telah didapatinya (lihat perenggan 38 & 40).

(3) Walaupun Borang II tidak ditafsirkan kepada *detenu* dalam Bahasa Tamil, ia tidak mempunyai apa-apa 'kaitan secara langsung kepada

pembuatan perintah tahanan' kerana *detenu* hadir sepanjang prosiding di hadapan Lembaga dan bahawa dia telah diwakilkan secara sah di sana. Kenyataan bahawa Borang II tidak diterjemahkan ke Bahasa Tamil tidak dengan apa-apa cara menjejaskan *detenu*. Ia juga sukar untuk diterima di mana *detenu* sendiri menyatakan bahawa dia memahami Bahasa Malaysia, hakikat bahawa dia tidak memahami Borang II (lihat perenggan 41 & 43).]

Notes

For cases on application for, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2617–2624.

Cases referred to

Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal [2006] 1 MLJ 320; [2005] 4 CLJ 445, FC (refd)

Borhan bin Hj Daud & Ors v Abd Malek bin Hussin [2010] 6 MLJ 329; [2010] 8 CLJ 656, FC (refd)

Chitra Devi Suppiah v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] MLJU 2232; [2011] 3 CLJ 557, HC (refd)

Edward Liew lwn Lembaga Pencegahan Jenayah Malaysia Penguasa Kanan Pusat Pemulihan Akhlak [2017] MLJU 1464, HC (refd)

L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] Supp MLJ 393; [2010] 7 CLJ 653, FC (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 2 MLJ 631; [2005] 3 CLJ 914, HC (refd)

Magendran Arumugam lwn Timbalan Menteri Dalam Negeri Malaysia dan lain lain [2016] MLJU 1901; [2016] 1 LNS 638, HC (distd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (refd)

Nagarathinam a/l Vadivaloo v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & 2 Lagi (Permohonan Jenayah No 44–29 Tahun 2005) (unreported), HC (refd)

Ragu Chandran lwn Timbalan Menteri Dalam Negeri Malaysia Dan Lain Lain [2016] MLJU 1900; [2016] 1 LNS 619, HC (refd)

SK Tangaliswaran v Timbalan Menteri Dalam Negeri & Ors [2009] MLJU 1878; [2009] 6 CLJ 705, HC (refd)

Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong Beng Chuan [2006] 6 MLJ 493; [2006] 4 CLJ 703, FC (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), (2)(c), (3), 5(2), (4), 6(1), 9(3), 10(1), 11(c), 11C, 11D

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 rr 3, 3(1), 4(3), 5(2), Forms I, II

Federal Constitution arts 5(3), 149

Internal Security Act 1960 (repealed by the Security Offences (Special Measures) Act 2012)

Noorfarihah bt Arshad (Nurul & Charan) for the detenu.
Siti Shafinaz (Federal Counsel, Ministry of Home Affairs) for the respondents.

Anselm Charles JC:

INTRODUCTION

[1] This is an application by the detenu for a writ of habeas corpus against the legality of a detention order dated 5 June 2017 made by the Deputy Home Minister ('the Deputy Minister') under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') ordering the detenu to be detained for a period of two years at the Pusat Pemulihan Akhlak Machang, Kelantan ('the centre') commencing from 5 June 2017.

BACKGROUND OF THE CASE

[2] Muraliraj a/l Balasepramaniam, ('the detenu') was arrested under s 3(1) of the Act on 13 April 2017 at Jalan Serindit, Sungai Jawi, Seberang Perai Selatan in the state of Penang. Investigations commenced soon thereafter when Superintendent of Police Shafee bin Abd Samad reported to Dato' Pahlawan Mohd Dzuraidi bin Ibrahim that the investigation against the detenu could not be completed within a period of 14 days.

[3] On 24 April 2017, the said Dato' Pahlawan Mohd Dzuraidi bin Ibrahim being the designated officer by the Inspector General of Police (IGP) under s 3(2)(c) of the Act submitted a report on the circumstances surrounding the arrest of the detenu to the Deputy Minister in order to comply with the condition requiring the police to conduct investigations beyond 14 days.

[4] On 17 April 2017 Police Investigation Officer ('IO') Insp Police Mohd Fadly bin Shamsudin recorded a statement from the detenu. He was assisted by D/Cpl Muhammad Ajwab bin Anuar. The statement was interpreted to the Tamil language by D/Cpl Sathiaseelan a/l Velandi.

[5] On 12 May 2017, the IO submitted a complete report on the investigations to the Deputy Minister and the Inquiry Officer of the Home Ministry pursuant to s 3(3) of the Act.

[6] On 26 May 2017, the inquiry officer, Dzul Iswari bin Mohd Jaafar conducted a physical investigation on the detenu by virtue of s 5(2) of the Act. Thereafter on 30 May 2017 the said inquiry officer submitted a report to the

Deputy Minister pursuant to s 5(4) of the Act.

[7] After examining the report, the Deputy Minister issued the detention order ('DO') dated 5 June 2017 pursuant to s 6(1) of the Act for a period of two years with immediate effect, that is from 5 June 2017.

[8] The DO, grounds for the DO, statement of facts and three copies of the Form for Making Representations (Borang I) were served and explained by the said D/Cpl Sathiaseelan a/l Velandi on 5 June 2017 at 11pm at the Bahagian Siasatan Jenayah Narkotik Ibu Pejabat Daerah (IPD) Manjung, Perak.

[9] On 6 June 2017, the detenu was brought to the centre. The detenu was informed and explained about the DO, grounds for the DO, statement of facts and his right to make representations by Mohd Zamri bin Ngah, the officer in charge of the center and explained by Sgt William a/l Micheal. On 7 June 2017, the detenu submitted the Borang I to the centre which was then served on the Advisory Board ('the board') on the same date.

[10] The board sent a Notice of Hearing of Representation (Borang II) which was fixed on 23 August 2017 at the centre on the detenu.

[11] After several request for postponement by counsel for the detenu, the board on 23 August 2017 sat to hear the representation of the detenu at the centre. During the said representation, the detenu attended and was represented by his counsel Mr Charan Singh. The IO was called as a witness.

[12] On 28 August 2017, the board presented a recommendation to the Yang di-Pertuan Agong ('the YDPA') concerning the representations made by the derenu pursuant to s 10(1) of the Act and after considering the said recommendations, the YDPA consented ('memperkenankan') to the DO made by the Deputy Minister on 13 September 2017.

THE LAW RELATING TO HABEAS CORPUS APPLICATIONS

[13] The powers and scope of the court when hearing an application for habeas corpus is circumscribed by s 11C of the Dangerous Drugs (Special Preventive Measures) Act 1985 Act 316 which in so far as is relevant reads as follows:

> 11C Judicial review of act or decision of Yang di-Pertuan Agong and Minister.
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, *save in regard to any question on compliance with any*

procedural requirement in this Act governing such act or decision. (Emphasis added.)

A 'judicial review' is stated in s 11D to include:

> 11D Interpretation of 'judicial review'
>
> In this Act, 'judicial review' includes proceedings instituted by way of —
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (c) *a writ of habeas corpus; and*
>
> (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

[14] In *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914, it was held:

> In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a habeas corpus application where the detention order of the Minister made under s 4(1) of the Ordinance or, for that matter, the equivalent sections in ISA 1960 and DD(SPM) Act 1985, *the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements.* It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. *If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.* (Emphasis added.)

[15] This decision was followed in *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445.

[16] The parameters of the court in applications of this nature were also considered in the case of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613, as follows:

> The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where a detention under s 6(1) has been made subsequent to an arrest and detention under s 3(1) and (2). It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular. This view is supported by *Barnardo v Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal

detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. In this regard *The Law of Habeas Corpus* (2nd Ed) by RJ Sharpe says at p 179:

> It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.

And at p 186:

> On the present state of the law, in almost every instance, the relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.

Therefore, a prior illegality which has ceased cannot be the subject matter of inquiry. That would also be the conclusion in the case of a detention order made under s 8(1) of the Internal Security Act 1960 and s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 subsequent to an arrest and detention made under both the statutes. It is perhaps appropriate to refer to *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where it was held that an order of detention made under s 8(1) of the Internal Security Act 1960 is not tainted by an illegality or irregularity in the s 73 detention. However, the conclusion was reached not on the rationale as discussed in this judgment but on the principles enunciated in *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129; [1969] 1 LNS 65. Such an approach would leave unanswered the effect of procedural irregularities in an earlier detention which has been superseded by another detention order. Be that as it may, that case made it clear that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s 73(1) of the Internal Security Act 1960 when it had been superseded by one under s 8(1) thereby bringing into sharp focus the propriety of the judgment of this court in *Mohamed Ezam Mohd Noor v Ketua Polis Negara & Ors* [2002] 4 CLJ 309. *The rationale underlying this judgment would, with respect, render the stand taken in the latter case unsustainable in law.* (Emphasis added.)

See also *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653.

It is therefore clear that the court is not to consider or deliberate upon the reasons, substance or merits of the decision made by the Minister but it must restrict itself to the issue of whether there has been a breach of any 'procedural requirement' in relation to the Act. It is also clear that this present application

is a 'judicial review' as interpreted under the Act. A

[17] Guided by these principles I proceeded to consider the oral as well as written submissions by the parties.

THE ISSUES B

[18] There were altogether seven issues that were brought up in this application. The issues can be summarised as follows:

(a) there was a breach of s 3(3) of the Act. The detenu was only fluent in the Tamil language and there was no Tamil interpreter provided when his statement was recorded by the Insp Mohd Fadly bin Shamsuddin; C

(b) the IO was not the one who recorded the statement of the detenu;

(c) the complete report of the IO under s 3(3) of the Act was not handed over to the first respondent; D

(d) the detenu was not given the opportunity to be advised by counsel;

(e) the first respondent failed to review the report of the IO in preparing the allegation of facts against the detenu; E

(f) the detenu was not explained that he could make a representation to the Advisory Board when the detention order was served on him; and

(g) there was no Tamil interpreter provided when the Borang II was served on the detenu. F

[19] At the hearing of the application learned counsel informed the court the she would be proceeding only on issues (a), (d) and (g) and proceeded to orally submit on those issues only.

G

THE PARTIES' SUBMISSIONS

[20] As to issue (a) it was alleged that no Tamil interpreter was provided when his statement was recorded by the Insp Mohd Fadly bin Shamsuddin. Learned counsel stated that the detenu had requested for a Tamil interpreter since the earliest stage of his detention. It was further asserted that as there was no Tamil interpreter present his fundamental rights were infringed. It was asserted that the failure to provide an interpreter would also amount to a question on non-compliance with a procedural requirement under s 11(c) of the Act. Learned counsel for the detenu referred to the cases of: H I

(a) *Chitra Devi Suppiah v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] MLJU 2232; [2011] 3 CLJ 557;

(b) *Ragu Chandran lwn Timbalan Menteri Dalam Negeri Malaysia Dan Lain*

A *Lain* [2016] MLJU 1900; [2016] 1 LNS 619; and

(c) *Magendran Arumugam lwn Timbalan Menteri Dalam Negeri Malaysia dan lain lain* [2016] MLJU 1901; [2016] 1 LNS 638,

B to advance the point that the failure to provide an interpreter justified for the writ of habeas corpus to be issued.

[21] The learned federal counsel ('FC') replied that, quite to the contrary, an interpreter was provided to the detenu at the time his statement was being C recorded by Insp Mohd Fadly bin Shamsuddin. This was affirmed by the recording officer Insp Mohd Fadly bin Shamsuddin himself and the Tamil interpreter D/Cpl Sathiaseelan a/l Velandi in their affidavits in reply in encls 15 and 28 by Insp Mohd Fadly bin Shamsuddin and encls 13 and 30 by D/Cpl Sathiaseelan a/l Velandi. D

[22] As to issue (d) it was submitted by learned counsel that the detenu was not given an opportunity to engage counsel with regard to his arrest and detention before the DO was issued by the Deputy Minister. It was only after E the DO was issued that he could engage counsel.

[23] In reply to this contention the learned FC stated that at each of the dates fixed for the hearing of the representation the detenu was represented by counsel. The chronology of the hearing was provided in the affidavit of the F secretary to the board namely one Redman bin Safar at encl 17. Briefly, on the first date for the sitting on the 13 July 2017 counsel for the detenu, Encik Rethinakumar a/l Subramaniam had asked for postponement as he was newly appointed. On the second date fixed for the sitting, 8 August 2017 a different counsel representing the detenu had also asked for an adjournment of the G sitting and this was allowed by the board. The sitting was then fixed to the following day, that is 9 August 2017. Counsel for the detenu, this time Cik Noorfarihah bt Arshad asked for another date be fixed for hearing of the representation because counsel for the detenu needed to obtain some documents. The next date given was on 23 August 2017. This time around H Encik Charan Singh came for the hearing of the representation. Apart from the detenu himself giving evidence, Insp Mohd Fadly bin Shamsuddin was also called as a witness during the proceeding.

[24] According to the learned FC the affidavit of Redman bin Safar was I sufficient evidence to refute the allegation that the detenu had not been given the opportunity to be represented by counsel.

[25] On issue (g) in respect of the failure to translate to Tamil Borang II to the detenu, learned counsel had referred to the affidavit of Mohd Ilham bin

Abdullah which is found at encl 8 and the exhibits annexed thereto marked 'Ml-1' consisting of four different copies of Borang II. He deposed that he had used Bahasa Malaysia in explaining the contents of the Borang II to the detenu. He stressed that the contents of the Borang II could be easily understood as it was in very basic Bahasa Malaysia concerning the time and place of the hearing of the representation is to be held.

[26] The learned FC had argued that although the contents of the four Borang II were in Bahasa Malaysia the detenu was not prejudiced in any way as on each occasion of the sitting the detenu was represented by counsel until the detenu's representation was finally heard on the 23 August 2017.

FINDINGS OF THE COURT

[27] As for issue (a) there is sufficient evidence from the recording officer Insp Mohd Fadly bin Shamsuddin in encls 15 and 28 and D/Cpl Sathiaseelan a/l Velandi in encls 13 and 30 that the statement had been recorded and interpreted to the detenu as mentioned in their affidavits. According to both of them the detenu informed them that he understood Bahasa Malaysia and was also fluent in Tamil. When asked whether the detenu wanted the services of a Tamil interpreter the detenu answered that he needed one. It was in those circumstances that D/Cpl Sathiaseelan a/l Velandi became the interpreter.

[28] Their version of the facts is supported by the affidavit of D/Cpl Muhammad Ajwab bin Anuar who deposed that at the time of the recoding he was assisting Insp Mohd Fadly bin Shamsuddin in recording the detenu's statement. He further deposed that D/Cpl Sathiaseelan a/l Velandi acted as interpreter from Bahasa Malaysia to Tamil and vice versa between Insp Mohd Fadly bin Shamsuddin and the detenu in the course of recording the statement. This is found in his affidavits in encls 19 and 33.

[29] After taking into account the affidavits of Insp Mohd Fadly bin Shamsuddin, D/Cpl Sathiaseelan a/l Velandi and Detectif Koperal Muhammad Ajwab bin Anuar I find that the statement was indeed recorded by Insp Mohd Fadly bin Shamsuddin and translated by D/Cpl Sathiaseelan a/l Velandi to the Tamil language.

[30] A point to note and one which would be significant later is that the detenu, apart from stating that he wished to make a representation to the board and engage counsel, specifically stated in the Borang I that he wished to make his representation in Bahasa Malaysia before the Advisory Board. The Borang I is exhibited as exh 'B' in the affidavit of the detenu at encl 2.

[31] I had also scrutinised the cases presented by learned counsel in support

of her contention on the alleged failure to provide a Tamil interpreter was a procedural non-compliance and therefore subject to judicial review. While appreciating the principle annunciated in these cases I find that the facts in the above mentioned cases in which this principle is based on is distinguishable from the facts of this present case. In *Chitra Devi Suppiah* the bone of contention was that a Tamil interpreter was not provided to the detenu when the inquiry process was being conducted under s 5(2) of the Act. This was the indisputable fact. In the present case however the respondents had vehemently stated that the statement recorded from the detenu was interpreted to him. The recording officer, the person who had assisted the recording office and the interpreter all deposed to this fact. The same set of circumstances is found in *Ragu Chandran* and *Magendran Arumugam* whereby the inquiry officer had not provided the services of an interpreter during the inquiry process despite the fact a Tamil interpreter had been provided to the detenu concerned prior to the inquiry process. Another point distinguishing the present case to those mentioned is that in the Borang I itself the detenu had stated that he wanted to conduct the representation before the board of Inquiry in Bahasa Malaysia.

[32] In respect of the contention that the detenu was not given the opportunity to be represented by counsel at the time of arrest and detention under the Act. It was argued that this was in breach of art 5(3) of the Federal Constitution.

[33] I take note that parties are in agreement that the detenu was represented in all the dates set for the hearing of his representation before the board including the date of the hearing itself. Further it is also not in dispute that the detenu had stated in Borang I that he proposed to be represented by counsel during the board proceedings. That having been said the question which arises is whether the detenu was entitled to be represented by counsel before he made the representation to the Advisory Board?

[34] Before going further, it is pertinent to note that the preamble to the Act states as follows:

> An Act to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs.
>
> WHEREAS action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened by a substantial body of persons both inside and outside Malaysia;
>
> AND WHEREAS Parliament considers it necessary to stop such action;
>
> NOW, THEREFORE, *pursuant to Article 149* of the Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in

Parliament assembled, and by the authority of the same, as follows ... (Emphasis added.)

[35] Article 149 of the Federal Constitution states as follows:

149 Legislation against subversion, action prejudicial to public order, etc

(1) if an Act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of parliament; and Article 79 shall not apply to a bill for such an Act or any amendment to s.uch a bill.

[36] Clause 3 of art 5 states in clear terms that 'where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'.

[37] This point was raised in the Federal Court case of *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329; [2010] 8 CLJ 656 where Raus Sharif JCA (as he then was) stated as follows:

[19] At the outset, we need to point out that the arrest of the respondent was not an ordinary arrest. The respondent was arrested under s 73(1) of the ISA. *ISA is a special law made under art 149 of the Constitution*, which provides as follows:

If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

A (b) ...

(c) ...

(d) ...

(e) ...

B (f) ...

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 and 13, or would apart from this Article be outside the legislative power of C Parliament and Article 79 shall not applied to a Bill for such Act or any amendment to such a Bill.

[20] *As can be seen above, art 149 of the Constitution expressly provides that such a law as the ISA is valid notwithstanding that it is inconsistent with arts. 5, 9 or 10 and 13 of the Constitution*. The Federal Court in Kam Teck Soon had addressed this issue. D Ahmad Fairuz CJ speaking for the majority stated at p 232 as follows:

> Article 149(1) of the Federal Constitution and Article 150(6) of the Federal Constitution *for instance, show clearly how art 5 cannot apply to arrest 'under any law whatsoever in force in this Country'* ...

E In light of Article 150(2) of the Federal Constitution, s 3(1) of the Ordinance clearly cannot be contended to be invalid just because it is inconsistent with Article 5(3) of the Federal Constitution. What is the purpose of not invalidating s 3(1) if it is not for validating an arrest and detention which becomes unlawful due to non-compliance of Article 5(3). I am of the view that if s 3(1) is inconsistent with F Article 5(3) then s 3(1) must prevail over Article 5(3). This would save the arrest and detention which would have been unlawful because of violation of Article 5(3). This in my view is the purpose of Article 150(6) of the Constitution.

[21] We are bound by the above statement of principle. We are conscious that the above statement of principle was in relation to arrest under s 3(1) of the Emergency G Ordinance Public Order and Prevention of Crimes 1969 (Ordinance), a law made under art. 150 of the Federal Constitution. However, we are of the view that the same interpretation should apply to s 73(1) of the ISA. This is because the wording of s 3(1) of the Ordinance is similar to that under s 73(1) of the ISA in substance. (Emphasis added.)

H

[38] Although *Borhan Hj Daud* was concerned with the Internal Security Act 1960 I am of the view that the principle applies to this case as the Dangerous Drugs (Special Preventive Measures) Act 1985 was also enacted pursuant to art 149. The effect therefore of art 149 pursuant to which the Act I was created would deny the detenu the right to legal representation as enshrined in art 5(3) of the Federal Constitution unless stated otherwise under the Act itself or Rules made under it.

[39] In this case s 9(3) explicitly provides for Rules to be made by the Yang

Di-pertuan Agong. Pursuant to this section the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules') had been formulated where these Rules provide for the detenu to be legally represented. Borang I was added to the schedule pursuant to r 3 of the Rules. Rule 3(1) states:

> (1) When any person is served with a detention order, the police officer serving the detention order shall at the same time —
>
> (a) inform that person of his right to make representations against the detention, order; and
>
> (b) provide him with three copies of Form I prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.

[40] Rule 4(3) states that a detained person may indicate in Borang I whether he intends to appear personally or through his representative or both. Rule 5(2) further states the time and place appointed, the detained person may appear before the board either in person or be represented by his advocate. Consequently, I find that only in these circumstances can the detenu be entitled to legal representation in which he did have in this case.

[41] As to the issue of the Borang II not being interpreted to the detentu in the Tamil language it was acknowledged that Borang II was explained to the detenu in Bahasa Malaysia by Mohd Ilham bin Abdullah whose affidavit is found at encl 8. I had perused the Borang II in exhs 'MI1'. The contents of Borang 1 was merely to inform the detenu of the place and date of the hearing of the representation and nothing more. I find that although the Borang II was not interpreted to the detenu in Tamil it does not in any way have any 'direct relevance to the making of the detention order' as the detenu was present throughout the proceedings before the board and that he was legally represented there. I also find that the fact that the Borang II was not translated to the Tamil language does not in any way prejudice the detenu.

[42] It is apt here to quote the Federal Court case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong Beng Chuan* [2006] 6 MLJ 493; [2006] 4 CLJ 703 where Augustine Paul FCJ succinctly stated:

> It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. *Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order*. (Emphasis added.)

[43] It is also hard to accept, in the circumstances of this case where the detenu himself stated that he understood Bahasa Malaysia, the fact that he did not undertand Borang II. It would perhaps be appropriate to mention the case

of *Nagarathinam a/l Vadivaloo v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & 2 Lagi* (Permohonan Jenayah No 44–29 Tahun 2005) (unreported) where Jeffery Tan J (as he then was) stated as follows:

> The applicant is, by his own admission (see encl 4), a citizen of Malaysia where Bahasa Malaysia, apart from the fact that it is the official language, is the lingua franca. Surely over the years and in his daily life, the Detenu would have picked up the lingua franca. The Detenu is the holder of identity card number 811121–06–5863, which first six digits reveal (see reg 5(2A) of the National Registration Regulations 1990 as amended by PU(A) 232/01) that the applicant is well within that age as to have received some formal instruction in Bahasa Malaysia. It must stand to reason that the applicant could surely speak and understand simple Bahasa Malaysia. Indeed ... On the contrary, simple Bahasa Malaysia would suffice to serve the purpose'. The appeal against that decision which went all the way to Federal Court (MPRJ No: 05–1–06) was dismissed on 27 June 2006. See also *Lim Kok Chong lwn Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Yang Lain* [2011] MLJU 1567; [2011] 1 LNS 370.

[44] Lastly learned counsel had cited the case of *Edward Liew lwn Lembaga Pencegahan Jenayah Malaysia Penguasa Kanan Pusat Pemulihan Akhlak* [2017] MLJU 1464 for the proposition that if there is more than one version or inference ,then the version or inference favourable to the applicant should be considered by the court. The part of the judgment quoted by learned counsel stated that:

> Adalah menjadi undang-undang yang mantap bagi seseorang yang ditahan tanpa perbicaraan (*detention without trial*), untuk mendeposkan bahawa tahanan terhadapnya adalah tidak sah. Beban pembuktian terletak diatas bahu pihak responden untuk membuktikan bahawa tahanan tersebut adalah tidak sah dan penahanan pemohon tersebut adalah mengikut prosedur mandatory. Sekiranya ujud lebih daripada satu versi atau inferens, maka versi atau inferens yang memihak kepada pemohon hendaklah diambil kira oleh mahkamah.

[45] The learned judge in *Edward Liew* was referring to the case of *SK Tangaliswaran v Timbalan Menteri Dalam Negeri & Ors* [2009] MLJU 1878; [2009] 6 CLJ 705 where His Lordship Gopal Sri Ram FCJ stated:

> *Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged.* And in a matter as important as individual liberty, where contradictory everments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence *presented by the detaining authority, the inference most favourable to the detenu must be drawn*. (Emphasis added.)

[46] This court is of the view that the differences and contradiction must arise from the respondent's case itself. This is a reasonable observation as there

will always be differences and contradictions between the facts presented by the detenu and those by the detaining authority in an application for writ of habeas corpus. Suffice for me to say that I find no conflicting or contradictory evidence in the affidavits adduced by the respondents.

[47] For the sake of completeness, I had also examined the other issues which were not raised namely (b), (c), (e) and (f) and agree with the learned FC that they are devoid of merit. These issues raised in the detenu's affidavit in support of this application had been successfully referred to and rebutted in the various affidavits in reply filed herein.

CONCLUSION

[48] After considering all the facts and hearing submissions on the issues raised I find that there is no merits in this application I therefore dismiss this writ of habeas corpus.

Application for habeas corpus dismissed.

Reported by Nabilah Syahida Abdullah Salleh